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Affidavit of V. Willard

Vanessa Boyd Willard
Attorney, US Department of Justice

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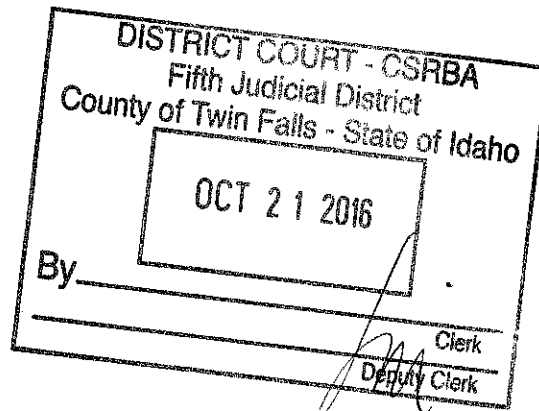
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Attorneys for the United States



**IN THE DISTRICT COURT FOR THE FIFTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO IN AND FOR THE COUNTY OF TWIN FALLS**

In Re the CSRBA

Case No. 49576

) Consolidated Subcase No. 91-7755
)
)
) **AFFIDAVIT OF VANESSA BOYD WILLARD**

State of Colorado)
County of Denver)

I, Vanessa Boyd Willard, being first duly sworn, state the following:

1. I am a competent adult over the age of eighteen years, and the statements made herein are based on my own personal knowledge.

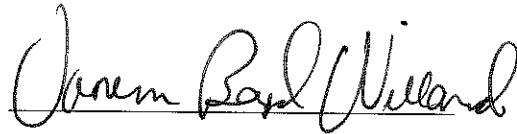
2. I am currently employed as an attorney with the United States Department of Justice at 999 18th Street, South Terrace, Suite 370, Denver, Colorado, 80202. I represent the United States in this case.

3. Attached to this Affidavit are true and correct copies of the following unpublished opinions issued by the Washington Superior Court:

Ex. 1 - *Washington Dep't of Ecology v. Acquavella*, No. 77-2-01484-5, Memorandum Opinion: Treaty Reserved Water Rights at Usual and Accustomed Fishing Places, slip op. (Wash. Super. Ct. Sept. 1, 1994)

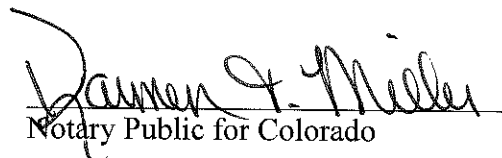
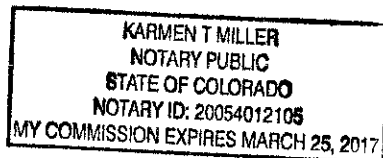
Ex. 2 - *Washington Dep't of Ecology v. Acquavella*, No. 77-2-01484-5, Memorandum Opinion: Flushing Flows, slip op. (Wash. Super. Ct. Dec. 22, 1994).

DATED this 20th day of October, 2016.



Vanessa Boyd Willard

Subscribed and sworn before me this 20th day of October, 2016



Notary Public for Colorado

Residing at Denver, Colorado

My Commission expires: 3/25/17

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR YAKIMA COUNTY

IN THE MATTER OF THE DETERMINATION
OF THE RIGHTS TO THE USE OF THE
SURFACE WATERS OF THE YAKIMA RIVER
DRAINAGE BASIN, IN ACCORDANCE WITH
THE PROVISIONS OF CHAPTER 90.03,
REVISED CODE OF WASHINGTON,
STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Plaintiff,

vs.

JAMES J. ACQUAVELLA, et al.,

Defendants.

NO. 77-2-01484-5

Memorandum Opinion: Treaty
Reserved Water Rights at Usual
and Accustomed Fishing Places

I. INTRODUCTION

This Opinion arose from Sunnyside's Motion for Declaratory Judgment as to the treaty fish water right in Ahtanum Creek (Subbasin 23). (See Motion dated November 2, 1993). It became clear from discussions in court that this issue had a broader context than just Ahtanum Creek and, according to the U.S. on behalf of the Yakama Nation, would eventually impact all areas that were "usual and accustomed" fishing locations for the Yakama Nation. Specifically, Sunnyside Division made the following four requests which this Opinion will address:

A. To declare that the YIN's treaty fishing right have been diminished in the Yakima River and its tributaries; that the maximum scope of the diminished treaty water rights for fish remaining is the specific "minimum instream flow" necessary to maintain anadromous fish life only at the remaining usual and accustomed fishing places still protected by the June 1855 treaty with the Yakamas.

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B. To declare that the U.S. and the YIN are precluded from claiming water to support a fishery at any remaining usual and accustomed places not specified in its pleading in ICC Cause No. 147.

C. ~~To declare that the YIN treaty fishery on Ahtanum Creek has been destroyed by actions of the United States; that if the right has been destroyed, the Yakima Indian Nation is entitled to no water for instream flows in Ahtanum Creek.~~

D. To exclude in limine introduction of any and all evidence relating to treaty fishing rights inconsistent with A, B, and C above.

E. To declare the U.S. and YIN are bound, precluded or estopped by this Court's 5/22/90 "Memorandum Opinion Re: Motions for Partial Summary Judgment", 10/22/90 "Amended Memorandum Opinion", and "Amended Partial Summary Judgment" [Aff'd. DOE v. YRID, et al., 121 Wn.2d 257 (1993)], finding, concluding and determining all YIN treaty fish water rights in the Yakima River and all its tributaries including Ahtanum Creek have been substantially limited and diminished to a residual right "... necessary to maintain fish life."

(Sunnyside Division's Amended Consolidated Motion to Clarify 11/29/90 "Amended Partial Summary Judgment For Declaratory Judgment and In Limine Re: Reserved Treaty Fish Water Rights.)

II. OPINION

A. Partial Summary Judgment and DOE v. YRID

The October 22, 1990 Memorandum Opinion Re: Partial Summary Judgment (Partial Summary Judgment) considered and resolved the irrigation and fishery water rights for the Yakima Indian Nation pursuant to their 1855 treaty with the United States. That opinion was

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1 limited to waters in the Yakima River and exempted consideration of the
2 Ahtanum, Toppenish, Simcoe and Satus Creeks. Mem. Op. at p. 6-7. This
3 Opinion will primarily clarify and expand the Partial Summary Judgment
4 along with considering the implications of the state Supreme Court's
5 review of that decision in DOE v. YRID, supra. However, although this
6 opinion includes Ahtanum Creek and all off-reservation Yakima River
7 tributaries, it does not apply to Toppenish, Simcoe and Satus Creeks,
8 except insofar as they are tributary to the Yakima River where
9 anadromous fish must pass through to spawn.

10 This Court held the treaty right for fish flows were diminished by
11 actions of the U.S. government and the "maximum limits of the diminished
12 treaty fishing rights is the minimum amount of instream flow that is
13 absolutely necessary for the mere maintenance of fish life in the
14 river." Mem. Op. at 55. This diminished right was affirmed by the
15 Washington Supreme Court. DOE v. YRID, 121 Wn.2d 257, 287 (1993)
16 ("although the treaty rights were not extinguished, they were
17 diminished.") This Court and the Supreme Court primarily relied on the
18 1968 settlement and dismissal in Docket No. 147 before the Indian Claims
19 Commission (ICC) in finding a diminishment had previously occurred by
20 various actions and decisions of Congress, agencies and the judiciary.
21 Id. at 287-291; Mem. Op. at 53. The petition filed with the ICC is also
22 instructive as to this matter. The petition alleged that the U.S.:

23 "in improvidently and unlawfully constructing power and
24 irrigation dams in the Yakima, Naches, Tieton and Klickitat
25 Rivers and their tributaries, and in improvidently,
negligently and unlawfully failing to install fish screens in
irrigation canals and laterals, in permitting the pollution of
streams, has completely destroyed all of the usual and
accustomed fishing locations of petitioner." ICC Petition, at

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11 (emphasis added).

2 In U.S. v. Dann, 873 F.2d 1189, 1198 (9th Cir.), cert. den. 493
3 U.S. 890 (1989), the court held the ICC could not extinguish Indian
4 treaty rights, that it only had jurisdiction to award damages for the
5 taking of those rights by the U.S.. The court also held that "payment
6 of [a] claims award establishes conclusively that a taking occurred",
7 even though the claim was not actually litigated. Id. at 1199.

8 Even though the diminishment standard was not specifically applied
9 throughout the off-reservation "usual and accustomed fishing locations"
10 in the Partial Summary Judgment, the ICC claim had at least that much
11 reach and res judicata would apply to fishery water rights on those
12 tributaries. The U.S. apparently does not totally disagree with this
13 ruling. During the November 4, 1993 oversight hearing, Charles
14 O'Connell stated on behalf of the U.S.:

15 [This opinion (Partial Summary Judgment) deals solely with the
16 treaty rights of the Yak[a]ma Nation...with regard to the
17 treaty rights to satisfy irrigation needs because, if you read
18 your opinion, it's bifurcated.... You address the treaty
19 rights for irrigation needs and then you address the treaty
20 rights for fishing purposes. And I think that language there
21 was meant to go to the Yak[a]ma Indian's rights to the use of
22 Yakima River water to satisfy its irrigation needs. I think
23 your...fishing rights discussion was more expansive...than
24 merely the Yakima River. ...Because you found that there is
25 federal action in the basin that diminished the Yak[a]ma
Indian Nation's treaty fishing rights and that the...Indian
Claims Commission's decision merely confirmed that. Transcript
of Proceedings, November 4, 1993 p. 108

22 In that the Partial Summary Judgment dealt with two matters,
23 irrigation and fishery rights, and the Court primarily had irrigation
24 rights in mind when it limited the Opinion to the Yakima River, the U.S.
25 is correct. Accordingly, the ruling regarding treaty fishing rights,

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like the ICC claim, was intended to be more basin-wide. From the
2 passage quoted above and from information submitted by the U.S. during
3 briefing, the federal government, on behalf of the YIN, agrees the
4 Partial Summary Judgment applies to some of the Yakima's tributaries.
5 Amended Notice of Water Right Claims For Instream Flows in Yakima River
6 Basin Tributary Watersheds, March 1, 1994 ("It is the position of the
7 United States that this Court's amended partial summary judgment
8 ...awarded diminished water rights for instream flows...in the Yakima
9 River and those tributary watersheds that are controlled and/or affected
10 by the Yakima Reclamation Project").

11 B. Basin-wide Diminishment

12 Because all parties agree that the diminished water right applies
13 to the Yakima River and creeks tributary thereto, the issue reduces to
14 which tributaries are diminished pursuant to the Partial Summary
15 Judgment. The non-Indian irrigators argue fishing rights to all off-
16 reservation tributaries are diminished or extinguished based on concrete
17 historical evidence and mention in the ICC claim of "all of the usual
18 and accustomed fishing locations of petitioner." The U.S. argues only
19 those rights in areas specifically served by the Yakima Project were
20 diminished by the Court's previous opinion with the remainder carrying
21 an undiminished right. Id. In support, the U.S. cites to this Court's
22 decision vesting the Superintendent of the Yakima Project, in
23 consultation with SOAC, with decisionmaking authority as to necessary
24 stream flows for maintenance of fish life. Transcript of Proceedings,
25 November 4, 1993, at 109. Additionally, the U.S. asserts it was this
Project's effects on the fish flows that were at issue in this Court's

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opinion and the basis for the ICC claim. Thus, the ~~diminishment~~ ruling should have only as much reach as the Yakima Project.

In regard to the U.S. and the YIN, although the Court made the decision to vest the Superintendent with authority to set necessary in-stream flows, that decision was apart from the one pertaining to the actual water right. The decision to award a diminished water right, both by this Court and the Supreme Court was based on the proceedings before the ICC and actions by Congress, administrative bodies and the judiciary. See Part. Summ. Judgment, May 22, 1990 at p. 53; DOE v. VRID, supra, at 291. This Court is also not persuaded to limiting it's ruling to tributaries with actual Project facilities and diversions because of its effects on fish migration. Even though the ICC claim was very specific, it did not make such a distinction. Rather, there were several bases for the diminishment including "the failure of defendant to properly protect the property of" the YIN, failure to install screens and permitting pollution of streams; actions not specifically tied to the Project. ICC Claim at p. 11, para. XVI. Additionally, the claim specifically sought damages for destruction of the fishery in the "Yakima, Naches, Tieton and Klickitat rivers and their tributaries." Id. Even if we were to accept the U.S.'s argument that only a few rivers are affected directly by the Project, that does not mean the smaller creeks tributary to those Project rivers are unaffected by it in regard to fish flows. See KRD v. SVID, Civil Cause No. 21, Fed. Dist. Court, Jan. 31, 1945 p. 25-26 ("[F]lood water is available...when, as determined by the Yakima Project Superintendent, there is flowing over the Sunnyside dam flood water in excess of the amount... necessary for proper river

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regulation, including in said amount the amount necessary to protect fish life in the river below said dam.") Emphasis added.

The Court believes both sides have taken a too-narrow focus of the geography at issue. The Court is mindful of the fact this is a water rights adjudication; fish allocation was settled in other venues. See, e.g., Wash. v. Wash. Comm. Pass. Fishing Vessel Assn., 443 U.S. 658 (1979). Additionally, fish migration makes the interpretations of both sides illogical and impractical for purposes of the adjudication. For example, YIN argues that

"[i]f there is otherwise an 'undiminished' right on certain tributaries, the difficulty of fish to reach those tributaries because they may, perhaps, have to swim through or past 'diminished' usual and accustomed fishing sites thus does not mean there is not an undiminished water right for fish at those sites." YIN's Response Brief at 24.

This conclusion fails to address the effects of the ICC action. The mainstem Yakima fishery water right is diminished because of the effects of reduced flows, dams and unscreened irrigation canals, etc. See ICC Petition. Accordingly, fish trying to reach tributaries may be prevented from this goal at numerous points along the way. A fish attempting to spawn in Park Creek, who is inadvertently diverted into the Wapato Project canal, makes up a fish run that is diminished in both the Yakima River (not available for capture at a usual and accustomed place) and Park Creek (cannot spawn, thereby not producing more fish to be taken or harvested at a usual and accustomed fishing place.)

The effect of the U.S.'s actions or inactions on fish throughout the basin and the resulting inability to take fish at certain places was at issue in the ICC action. ("That since the year 1900, by reason of

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these acts of the defendant, at these usual and accustomed fishing
2 places of the Yakima Tribe located at and along the Yakima, Naches,
3 Tieton and Klickitat rivers, the salmon and other valuable food fish
4 ceased to run in any material numbers....") ICC Complaint § 16. If our
5 hypothetical fish returns to a tributary not listed in the ICC claim and
6 is unable to spawn for lack of stream flow, does that not deprive the
7 YIN an opportunity to take fish, if they migrated to the ocean and
8 return, as they pass "usual and accustomed" fishing locations on the
9 Yakima, Naches and Tieton rivers and their tributaries, i.e., a
10 "diminished" right?

11 This Court interpreted the meaning of "Yakima River and its
12 tributaries" in the context of the "limiting agreements." Memorandum
13 Opinion Re: Limiting Agreements, June 16, 1993. Therein, the Court
14 determined a limitation on diversions from the Yakima River and its
15 tributaries included all waters tributary to the Yakima River. Mem. Op.
16 at 27. The phrase would seem to have the same applicability in this
17 setting. If anything, the ICC claim is more clear than the limiting
18 agreements as it applied to the "Yakima, Naches, Tieton and Klickitat
19 rivers and their tributaries." Although the Yakama Nation would have
20 the Court read this as applying to the Yakima River and specific
21 ~~tributaries, i.e., the Naches and Tieton Rivers~~ (an argument identical
22 to that advanced by the irrigators in the Limiting Agreement dispute),
23 the specificity and plain wording of the complaint convinces the Court
24 as to the ICC's applicability to the various small creeks which drain
25 into those specified waterways.

The Limiting Agreements opinion examined the BOR's reliance on the

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waters from the small tributaries in calculating the Total Water Supply Available (TWSA). If the U.S. relies on the argument the ICC claim only applied to and diminished those waters that are part of the project, then they must consider these tributaries, at least for some limited purposes, part of the project. They did so in arguing the meaning of the Limiting Agreements. See, inter alia, Mem. Op. Re: Limiting Agreements; see e.g. U.S. Reply Brief at 2,3 and 21 ("Interpreting the limiting agreements [as only applying to a few major tributaries]... would seriously undermine the continued success of the Project").

This Court believes all water courses in the Yakima Basin are connected, in regard to fish and the Project, and each cannot be looked at entirely in their individual capacity. Such is the meaning and result of the ICC action. The Supreme Court appears to reach a similar conclusion in holding that

"the settlement of the Yakima Indian's claim for damage to fishing right in the Yakima Basin constituted an acknowledgment that a "taking" had occurred, that the Indians' reserved water right for fish had been diminished, and precludes the Indians from arguing that those rights have not been diminished in any respect." DOE v. YRID, supra, at 257, 303 (emphasis added).

The Partial Summary Judgment defined the diminished right as an amount necessary to maintain fish life in the Yakima River. To achieve that, in light of the anadromous fish life cycle, a diminished right is imperative for the tributaries that serve as spawning grounds. Fish life cannot be maintained without a place for fish to spawn. The Superintendent of the Yakima Reclamation Project, in consultation with SOAC, shall administer those waterways to maintain fish life and comply with this Court's opinion. The U.S. and YIN are barred from claiming a

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greater right to any off-reservation Yakima River tributaries.

2 III. AHTANUM CREEK FISHERY RIGHT

3 Although the Court's ruling above establishes a diminished water
4 right in the appropriate off-reservation tributaries for maintaining
5 anadromous fish life in the Yakima River and its tributaries, the Court
6 must now make a specific determination as to the fishery water right in
7 Ahtanum Creek. Ahtanum presents unique factual and legal circumstances,
8 as to the history of fish life and the actions of the U.S., that is
9 unlike any other water course in the basin. Moreover, Ahtanum is the
10 first on-reservation tributary to be considered by the Court. Based on
11 these unique events, the Court makes the following conclusions.

12 Geographically, Ahtanum Creek defines part of the northern boundary
13 of the Yakama Reservation. Transcript of Proceedings, Council between
Governor Stevens and Tribes of Indians, June 9, 1855. The Treaty of
15 1855 reserved rights in and to Ahtanum Creek for the YIN. Winters v.
16 United States, 207 U.S. 564 (1908) (When the United States establishes a
17 reservation for Indians, it reserves not only land, but also sufficient
18 water to fulfill the reservation's purposes); United States v. Ahtanum
19 Irrigation, 236 F.2d 321 (9th Cir. 1956). The Court notes the treaty
20 secures two types of fishing rights, depending on the location of the
21 stream. Article 3 reserves "[t]he exclusive right of taking fish in all
22 the streams, where running through or bordering said reservation... as
23 also the right of taking fish at all usual and accustomed places, in
24 common with the citizens of the Territory...."

25 To determine the Ahtanum Creek water rights has required two
adjudications, an agreement between the U.S. and north-side (non-

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reservation) users, and two visits by the U.S. Court of Appeals, Ninth
2 Circuit. These activities took place from approximately 1908 to 1964.
3 Additionally, the Washington Supreme Court analyzed the Ahtanum Creek
4 water rights to glean principles for determining Yakima River water
5 rights. DOE v. YRID, 121 Wn.2d 257, 281-283 (1993).

6 In 1908 two relevant activities took place: the U.S. Supreme Court
7 decided Winters v. United States, 207 U.S. 564, followed by the Bureau
8 of Indian Affairs (BIA) entering into an agreement with the northside
9 irrigators. In that agreement, an agent for the BIA, W.R. Code,
10 promised the northside landowners 75% of the water while reserving the
11 Indians a 25% share. The Ninth Circuit, although acknowledging that
12 such an agreement was "one practically without precedent", United States
13 v. Ahtanum Irrig. Dist., 236 F.2d 321, 331 (1956), found the so-called
14 "Code agreement" was valid as an exercise of the general power bestowed
15 on the Secretary of Interior by Congress in order to manage Indian
16 affairs. Id. at 336. Therefore, the Secretary could make "a peaceful
17 arrangement for a practical mode of use of the waters of this stream."
18 Id.; see also DOE v. YRID, supra, at 282. This Court must decide if
19 the 1908 agreement together with actions by the United States in
20 constructing and operating the Wapato Irrigation Project have diminished
21 or extinguished the YIN's treaty fishing right in Ahtanum Creek. That
22 the Code agreement, as interpreted by the Ninth Circuit, settles and
23 establishes all irrigation claims, there can be little doubt. The
24 agreement itself sets forth the following:

25 "THAT WHEREAS the parties hereto claim certain quantities of
water in the Ahtanum Creek, County of Yakima, State of
Washington, and a right to divert the same for irrigation

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purposes..." (emphasis added).

2 Additionally, Article 6 states:

3 "It is further understood and agreed that the water herein
4 divided between the parties hereto may be used for domestic,
 power, stock, and irrigation purposes."

5 In the first appeal, the Ninth Circuit set out the U.S.' complaint in
6 the quiet title suit on behalf of the YIN for irrigation waters to
7 successfully cultivate the arid reservation lands. Ahtanum at 236 F.2d
8 321. Nowhere are treaty fishing rights specifically referred to.
9 However, this Court determined in the Partial Summary Judgment that
10 there can be more than one primary purpose for treaty reserved waters,
11 including an in-stream right for fish. See pages 44-45; see also,
12 Colville Confederated Tribes v. Walton, 641 F.2d 42 (1981) cert. denied.

13 The Ahtanum court also required any agreement which purports to
14 compromise Indian water rights be "construed most strongly in favor of
15 the Indians." 236 F.2d at 340; construed in, Ecology v. YRID, 121
16 Wn.2d 257, 283. In Ecology, the Supreme Court then proceeded to make
17 the following holding:

18 "We further hold that the same rules of construction that
19 apply when considering whether Congress intended to abrogate
20 treaty rights should be applied in construing the actions of
 the Secretary of the Interior." Id.

21 That rule of construction, as determined in U.S. v. Dion, supra,
22 requires there be a clear indication that the Secretary at least
23 considered the fact he was extinguishing the Indians' right to fish in
24 their usual and accustomed places by his actions. Ecology at 283. Such
25 a clear expression of an intent to abrogate fishery rights is not in the
 Code agreement nor the Pope Decree. Additionally, the Ecology court

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noted the Code agreement was like the 1905 agreement limiting YIN's rights to Yakima River water and then held such an agreement did not abrogate treaty fishery water rights. Id. at 282.

Given a treaty fishery right existed, was it diminished by actions of the U.S. in operating the Yakima and Wapato Irrigation Project and by the damages awarded as part of the ICC claim? The U.S. and the YIN argue it was not the U.S., but rather northside irrigators that caused the near-total extinction of fish life on Ahtanum Creek. The non-Indian irrigators counter, stating it was development of the reservation project that caused the demise of salmon runs and the Pope Decree ruling allowing the WIP to divert all streamflow after July 10, that has nearly sealed the demise of Ahtanum anadromous fish runs. Interestingly, Ahtanum Irrigation District takes the position that the fish on Ahtanum Creek have rights and an instream flow should be maintained year round even if that requires a reduction in AID's water allocation.

From a review of the factual record, irrigators on both banks were instrumental in the destruction of fish runs. Early on, non-Indian, north-side irrigators were alleged to have diverted water to the detriment of the fish. (Report of Dr. Barbara Lane; Letter from Jay Lynch to Comm. of Indian Affairs, Aug. 14, 1901.) Around 1900, the predecessor to the BIA began construction of an irrigation system for service to the reservation. Ten ditches were diverting Ahtanum water by 1907. By 1915, the irrigation project was substantially completed on the reservation and served approximately 5000 acres. Ahtanum, 236 F.2d at 327. Finally, after the second visit to the Ninth Circuit, it was decreed in 1964 that on-reservation irrigators would receive the entire

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flow of Ahtanum Creek after July 10 of each year. U.S. v. Ahtanum
2 Irrigation District, 330 F.2d 897, 915 (1964). According to non-Indian
3 irrigators, since that award, the Wapato Irrigation District has
4 operated in a manner that completely dries up the stream below the #1
5 canal diversion from July 10 to mid-October. (See also affidavit of
6 John Monahan as to the "dewatering of the middle Ahtanum.")

7 On the other hand, the United States and the fish have not
8 completely forsaken Ahtanum Creek. In the 1930's, fish screens were
9 installed in the government canal. Recently, additional screening of
10 south side diversions has taken place to help restore runs. Such
11 activities were relied on by the Supreme Court in finding that even
12 though inconsistent activities had been pursued by the U.S. for
13 irrigation, there remained some continued recognition of the treaty fish
14 right. DOE v. YRID, supra, at 287. As to the existence of fish life,
15 the affidavit of John Monahan acknowledges there is some (although very
16 limited) remnants of fish life. Finally, the ICC action compensated
17 only for damages arising before August 13, 1946. 25 U.S.C. § 70a.

18 Based on the above, the Court has determined the Ahtanum Creek
19 fishery right, though severely diminished, has not been completely
20 destroyed. The United States has taken some steps to preserve the
21 ~~fishery and cannot shoulder complete responsibility~~ for the current run
22 decline. However, the United States has made certain decisions for
23 water allocation contributing to the decline. Thus, executive,
24 administrative and judicial actions by the U.S. from 1908 onward,
25 coupled with the ICC action, contributed to a water right diminishment
that now equals an amount necessary to maintain fish life, no more.


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Because the Wapato Irrigation Project (WIP) is an independent portion of the Yakima Project, the Court vests the WIP superintendent with authority to make decisions on the amount of water necessary to maintain fish life under the existing prevailing conditions. If water is made available by improvements to irrigation systems or otherwise on either side of the creek, additional water can be devoted to enhancement. However, such water is subordinate to existing diversion rights as set forth in the Pope decree. U.S. v. Ahtanum Irrig. Dist, supra.

IV. CONCLUSION

This Court held in the Partial Summary Judgment that the Yakama Indian Nation treaty fishery right had been diminished to an amount of water necessary to maintain fish life. The Washington Supreme Court affirmed. The Court now extends that decision to include all Yakima River tributaries affecting fish availability at the YIN's "usual and accustomed" fishing stations. Such rights carry a priority right of time immemorial. The Court extends the authority of the Yakima Project Superintendent, in consultation with SOAC, to make that decision. The Court also extends that ruling to include Ahtanum Creek, part of the northern border of the Yakama Reservation. The Wapato Irrigation Project Superintendent shall make that decision depending on the ~~existing prevailing conditions as to~~ Ahtanum Creek and to the on-reservation creeks, i.e., Toppenish, Simcoe and Satus Creeks.

Dated this 1st day of September 1994.



Judge Walter A. Stauffacher

Usual and Accustomed Places: Treaty
Reserved Fishing Water Rights - 15

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR YAKIMA COUNTY

IN THE MATTER OF THE DETERMINATION)
OF THE RIGHTS TO THE USE OF THE)
SURFACE WATERS OF THE YAKIMA RIVER)
DRAINAGE BASIN, IN ACCORDANCE WITH)
THE PROVISIONS OF CHAPTER 90.03,)
REVISED CODE OF WASHINGTON,)
STATE OF WASHINGTON,)
DEPARTMENT OF ECOLOGY,)

NO. 77-2-01484-5

Plaintiff,

Memorandum Opinion Re:
"Flushing Flows"

vs.

JAMES J. ACQUAVELLA, et al.,

Defendants.

I. INTRODUCTION

May 11, 1994, Roza Irrigation District (Roza) moved this Court for an Order Pendente Lite "directing the Bureau of Reclamation not to release storage water from the reservoirs serving the Yakima Project for the purported purpose of aiding the out-migration of anadromous fish smolt." Essentially, it is Roza's position (and later joined by Kennewick Irrigation District, City of Yakima, Naches-Selah Irrigation District and Kittitas Reclamation District) that these pulse flows are not "scientifically substantiated." Alternatively, the irrigation districts argue if pulse flows are "scientifically substantiated" and successful, they promote "enhancement" of fish life, not "maintenance" as directed by this Court's November 20, 1990 Partial Summary Judgment.

In requesting an Order Pendente Lite preventing releases of pulse flows from storage, the districts are essentially asking for injunctive

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1 relief. However, the motion, as broadened, also seeks clarification of
2 the Partial Summary Judgment insofar as it applies to that minimum
3 amount of water absolutely necessary to maintain fish life. See
4 Petitioner's Memorandum in Support of Motion for Order Pendente Lite, p.
5 10. A ruling on the injunction and the issue of clarification are
6 intertwined and will be taken up together below.

7 II. OPINION

8 In regard to these flushing flows, it appears there are two matters
9 to be clarified. First, on what criteria or directives from this Court
10 should the Yakima Field Office Manager make his decision to release
11 flushing flows. Secondly, on what basis should such decisions of the
12 Yakima Field Office Manager be reviewed by this Court.

3 A. Judicial Directive

4 Inasmuch as the irrigation districts are requesting further
5 clarification of the original opinion to facilitate and provide guidance
6 to the decision making of the Yakima Field Office Manager, the Partial
7 Summary Judgment must first be examined.

8 In that opinion, the Court determined in regard to fish flow treaty
9 water rights, that "the maximum limits of the diminished treaty fishing
10 rights is the minimum amount of instream flow that is absolutely
11 necessary for the mere maintenance of fish life in the river."
12 Memorandum Opinion Re: Motions for Partial Summary Judgment as Amended,
13 October 22, 1990. This decision was unanimously affirmed on appeal by
14 the Washington State Supreme Court. Ecology v. YRID, 121 Wn.2d 257, 850
15 P.2d 1306 (1993).

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1 However, this Court went well beyond simply determining this
2 fluctuating minimum instream flow amount in the 1990 Partial Summary
3 Judgment. First, it vested the Project Superintendent (Yakima Field
4 Office Manager) with authority to determine the minimum instream flow in
5 light of the annual prevailing conditions. Additionally, the Court gave
6 special attention to the function and makeup of the Yakima River System
7 Operations Advisory Committee (SOAC). That Committee, composed of
8 fishery biologists from the Yakama Indian Nation, Washington Department
9 of Fisheries, U.S. Fish and Wildlife Service and the irrigation
10 districts, advises and assists the Yakima Field Office Manager on
11 fishery-related issues in the Yakima Basin on an annual basis.
12 Additionally, the irrigation districts can personally influence any
13 decision-making by the Yakima Field Office Manager as part of the
14 consultation process. Partial Summary Judgment p. 8, November 29, 1990.
15 Indeed, the irrigators must find that input valuable as they pointedly
16 argued for a similar inclusion in this Court's recent order extending
17 the minimum instream flow to certain tributaries.

18 However, the Court went even beyond that. Beginning at page 58 of
19 the Memorandum Opinion, the Court discussed the difficulty in setting a
20 discrete amount as the minimum instream flow in light of natural
21 variables, etc. At line 13 of the opinion, it says,

22 "Even with a successful "flip-flop" operation, there are other
23 variables that may enter into the determination, on an annual
24 basis, of how much instream flow may be necessary to merely
25 preserve fish life in the river- such things as water quality,
climatic and temperature changes, changes in substrate locations
within the stream, etc. (Cite omitted). The material presented
indicates varying opinions by various agencies and experts as to

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1 which discrete amounts of instream flow are required at different
2 points of the river system to maintain fish life. With the SOAC
3 Committee, these variables can be, and apparently have been,
4 addressed on an annual basis to determine the timing and the
5 measure of instream flows to maintain the fishery.

6

7 In view of ever changing circumstances, it would be
8 inappropriate for the Court to set specific, discrete
9 quantifications to accomplish that purpose for all times and
10 conditions. That can be done by the SOAC Committee and the Project
11 Superintendent on an annual basis. As was stated in Sohappy v.
12 Smith, 302 F. Supp. 899, 911:

13 " . . . proper anadromous fishery management in a changing
14 environment is not susceptible of rigid predeterminations. . . .
15 The variables that must be weighed in each given instance make
16 judicial review of state (Project Superintendent) action, through
17 retention of continuing jurisdiction, more appropriate than overly-
18 detailed judicial predetermination." Emphasis added.

19 While it certainly would be convenient if the Yakima River was as
20 simple to operate as a goldfish bowl, in regard to providing for
21 maintenance of fish life, obviously such is not the case. The quotation
22 above defines one of the Court's primary goals in delegating maintenance
23 flow determinations to the Yakima Field Office Manager: to place
24 responsibility with an entity capable of responding to changing
25 conditions and thereby narrowly tailor flows to the needs of the fish.
The Field Office Manager and others can operate swiftly and modify
decisions based on unexpected natural events. This is so because they
~~are not constrained~~ by concerns of Due Process, etc., which attach to
court proceedings. Thus, only the absolute minimum amount of water
would be used at the expense of irrigation needs.

Such was the case here. On May 3, after waiting twice as long as
their own guidelines required, SOAC made the request for flushing flows

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1 in the amount of 3500 acre-feet. Based on last-minute natural events,
2 the BOR was able to reduce this amount to 1400 acre-feet, a sizable 60%
3 reduction in storage pass-through. Additionally, in the last few years,
4 the SOAC stood ready to make similar recommendations to the Yakima Field
5 Office Manager and declined, again based on last-minute, up-to-date
6 river information. Finally, the fact that SOAC has made only four
7 requests for pulse flows in thirteen years demonstrates the exact
8 flexibility this Court envisioned in the previous Memorandum Opinion.

9 Another objective of the Court in referring this matter to the BOR,
10 as quoted above, was to obtain the scientific expertise of the BOR and
11 the scientists comprising SOAC. If even possible, which this Court
12 seriously doubts, it would take much too long a time for this Court to
13 get up to speed in regard to the specific (and everchanging) scientific
14 knowledge necessary to make these rapid decisions in light of changing
15 natural conditions. It would also seriously impede the progress of the
16 sometimes forgotten goal of this case; to determine water rights in the
17 Yakima River Basin.

18 Therefore, this Court will not stray from its objectives in the
19 Partial Summary Judgment. To do so would defeat the goal of the
20 quantified treaty water right, which is to maintain fish life with use
21 of the ~~absolute minimum~~ amount of water possible in light of the various
22 life stages of anadromous fish. The process as set up (which includes
23 a representative of the irrigators) can respond to the widest array of
24 variables and can react much more quickly to changes in light of
25 fluctuating environmental conditions. The May 3-8 events further

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1 confirm this.

2 The Court, however, can give the following clarification. In
3 delegating the Yakima Field Office Manager with the task of maintaining
4 fish life, it did not limit him to rescuing only adult fish. Such a
5 limitation runs counter to the intent of the original formation of SOAC
6 by Judge Quackenbush in Kittitas Reclamation District v. Sunnyside
7 Valley Irrigation District, Civil No. 21 (E.D. Wash. 1980), i.e.,
8 protection of salmon redds (ultimately by way of the "flip-flop") and
9 this Court's own pronouncement from the bench November 8, 1990 (wherein
10 it was made clear once fish reach the Yakima River, spawn and establish
11 their redds, then the responsibility is to ensure only enough water that
12 these fish do not die). As the DOE argues, flushing flows are simply
13 another tool to protect existing fish life, only in a different phase.
14 So long as the Yakima Field Office Manager can show that a good faith
15 decision has been made to maintain fish life, regardless of the life
16 phase, with the sparsest amount of water possible, then this Court will
17 defer to their scientific expertise. See Department of Ecology v. PUD
18 1, 121 Wn.2d 179, 201 (1993) (an agency with specialized knowledge and
19 expertise as to the amount of river flow necessary to maintain fish life
20 must be given due deference.)

21 B. Judicial Review

22 At page 2 of their initial memorandum, the DOE asserts "[t]he
23 burden is on Roza Irrigation District to prove that the Bureau's
24 decision was arbitrary and capricious." The Court is not sure upon what
25 they base this assertion. The Court agrees with DOE that this is the

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1 applicable standard for measuring the actions of a federal agency acting
2 pursuant to specific statutory authorization. See Administrative
3 Procedure Act (APA), 5 U.S.C. §§ 551, 706. However, in the context of
4 this case, the Yakima Field Office Manager acts pursuant to the request
5 of the Court and in consultation with a judicially created committee.
6 Furthermore, the Court sets the standard by which the BOR operates and
7 reviews the decisions it makes. Accordingly, the Court does not
8 believe it is necessarily constrained by the APA's "arbitrary and
9 capricious" standard. See Farkas v. Ellis, 780 F. Supp. (S.D.N.Y.
10 1992) (administrator appointed by district court to oversee affirmative
11 action program established under consent decree could be considered a
12 court for purposes of the APA and thus excluded from definition of
13 "agency" under the Act.); see also 5 U.S.C. § 551(1)(E) (APA definition
14 of "agency" does not include agencies composed of representatives of the
15 parties... to the disputes determined by them). The governing
16 Washington law appears to be similar. See RCW 34.05.010 ("Agency means
17 any state board. . . authorized by law to make rules or to conduct
18 adjudicative proceedings except those in the legislative or judicial
19 branches) (Emphasis added).

20 Although it may not be applicable in every imaginable scenario, it
21 appears likely any ~~controversy as to~~ SOAC/Yakima Field Office Manager
22 decisions will result in a motion to enjoin some act, as it is here. A
23 motion to enjoin could result in an injunction. Accordingly, the
24 standards and burdens applicable to injunctions would be the basis for
25 that decision as it likely will be in similar future disputes.

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1 To grant injunctions is a remedy within the equitable powers of the
2 superior court. RCW 7.40.010-020; Tyler Pipe Indus. v. Dep't of
3 Revenue, 96 Wn.2d 785, 792, 638 P.2d 1213 (1982). To obtain injunctive
4 relief, the one seeking it must show

5 "(1) that he has a clear legal or equitable right, (2) that he
6 has a well-grounded fear of immediate invasion of that right,
7 and (3) that the acts complained of are either resulting in or
will result in actual and substantial injury to him." Tyler
Pipe, supra.

8 Since injunctions are addressed to the equitable powers of the
9 court, these criteria "must be examined in light of equity including
10 balancing the relative interests of the parties and, if appropriate, the
11 interests of the public." Id. Additionally, the trial court is vested
12 with a broad discretionary power to shape and fashion injunctive relief
13 to fit the particular facts, circumstances, and equities of the case
14 before it. Brown v. Voss, 105 Wn.2d 366, 372, 715 P.2d 514
15 (1986) (emphasis in original).

16 Taking into account these judicial clarifications, the legal rights
17 of the affected parties and the affidavits of the various biologists,
18 this Court cannot find that a permanent injunction as to flushing flows
19 is warranted. Nor can it hold that the pulse flow released in the May
20 5-8 period was unjustified and not in accord with this Court's previous
21 ruling.

22 First, although the irrigation districts at issue here have water
23 rights, the Yakama Indian Nation treaty right for fish is the oldest
24 priority date on the river, that of "time immemorial". Thus, their
25 right takes precedence over all other water users on the river. Partial

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1 Summary Judgment, p. 55 ("in the event of an unusually low water year,
2 these diminished treaty fishing rights will take precedence over other
3 vested rights..."). John Easterbrooks affidavit indicates that SOAC has
4 been poised to make a flushing flow request almost every year since it
5 was delegated this responsibility in 1980. If the action was not
6 scientifically bona fide then, it seems odd that it has not been earlier
7 challenged in order to protect against releases during water-tight years
8 like last seasons. The Yakama Nation, and therefore anadromous fish,
9 cannot be penalized because of this unusually low water year.

10 Secondly, although some evidence exists to the contrary, the vast
11 majority of the evidence and the opinions of neutral scientists
12 demonstrates that flushing flows have a positive influence on smolt
13 outmigration and survival. Cada Report, p. 32-33 (Declaration of Bruce
14 Watson, Attachment B) ("the general relationship of increasing survival
15 with increasing flow in the Columbia River Basin still appears to be
16 reasonable); Affidavit of James A. Esget, p. 4; Declaration of Phillip
17 R. Mundy, p. 3, 19-21; C. Dell Simmons, p. 6; Declaration of Bruce
18 Watson, Attachment B, p. 3; Affidavit of Walter Larrick, p. 4 ("SOAC's
19 recommendation was a consensus of all members and was based on sound
20 biological principles, real time biological data and demonstrated
21 experiences in the Yakima River"). ~~The flush~~ was successful, assisting
22 outmigration of 10% of the 1994 smolt migration. Affidavit of James
23 Esget. There is considerable evidence in the affidavits cited above
24 that smolts remaining in the river after the major spring runoffs face
25 a grim chance of survival due to increased water temperature, predation

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1 and possible "desmoltification." In sum, this Court is convinced that
2 the decision of Brian Person, Yakima Field Office Manager, reflected the
3 best available scientific knowledge.

4 It is also evident that the decision was narrowly tailored to
5 achieve the best results with use of the least possible water. In his
6 affidavit, Don Schramm, former District Engineer for Roza Irrigation
7 District, current Yakima Field Office Chief Hydrologist, describes the
8 events that led to the decision to allow the pulse flows. Numerous
9 meetings were held with the affected irrigation districts and companies
10 between February and April to refine the decision process in the event
11 a pulse flow was requested. Pulse flow Guidelines were developed by
12 Reclamation in consultation with SOAC, irrigation districts and others.

3 On 5/4/94, after the request for a pulse flow was made by all four
14 members of SOAC, a meeting was held where the irrigation districts
15 expressed their disapproval. An informal memo then came from
16 Reclamation asking SOAC to revise their request to utilize less of the
17 Total Water Supply Available. The revised hydrograph, shorter in
18 duration but higher in intensity, was expected to accomplish the same
19 result with a savings of 1500 AF of water. Additional natural changes
20 allowed for further reduction of the pulse flow. In conjunction,
21 historical operation data indicated that ~~only 50% of~~ the usual annual
22 outmigration had occurred by May 5, 1994, suggesting a real need to push
23 the remaining smolts along. See also, Affidavit of Brian Person.

24 Based on this information, the Court is convinced Reclamation made
25 this decision in good faith, keeping the interests of all parties in

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mind. It is evident everything possible was done to limit these
2 releases, including limiting the amount of release to the minimum flow
3 necessary; developing guidelines to help ensure reasoned decision-
4 making; waiting several days longer than required to facilitate a fish
5 passage event; involving all parties in the decision process; and a good
6 faith belief based on reasonable evidence that approximately 50% of the
7 smolts were awaiting increased flows. Obviously, such action will only
8 take place after a thorough investigation. This must be the case since
9 such releases have taken place quite infrequently. Additionally, the
10 irrigators involved in this dispute do not cite to any other action by
11 the Yakima Field Office Manager/SOAC that they construe to be
12 intentionally arbitrary. It also cannot go unsaid that even the
biologist representing the irrigators originally signed the request
14 (although he has qualified this signing after the fact). Last and most
15 important, the ends justified the means. A great number of smolts that
16 might otherwise have perished were successfully flushed down the river
17 into the Columbia.

18 The last question which needs to be addressed is whether this
19 release was an effort to "maintain" fish life or "enhance" it. While
20 the irrigators have offered a method for establishing a maintained
21 population, ~~the Court will hold~~ steadfast to its original opinion which
22 avoided such predeterminations. The majority of evidence presented in
23 this dispute indicates that "maintenance" of a fish population remains
24 a goal yet to be reached. According to Robert Tuck, fish biologist for
25 the Yakama Nation, "the current status of the spring chinook salmon run

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1 in the Yakima Basin is approaching extinction." Affidavit at p. 6. The
2 number of returning adults was approximately 1,300-1,500 fish, the
3 lowest return in over ten years and an 85% drop since 1986. The
4 expectation for 1995 is considerably less. Id. at p. 7. The steelhead
5 figures are similar, with a return this year of a mere 554, an 80%
6 reduction since 1987-88. Together with the continuing drop in
7 outmigrating smolt, the Court believes the evidence is adequate to
8 support the Yakima Field Office Manager's decision to release flushing
9 flows as a means to maintain fish life. As was said by C. Dell Simmons,
10 a member of SOAC:

11 "...[d]uring the spring months, a minimum, but sufficient,
12 instream flow is required by smolts to allow them to migrate
13 out of the Yakima River Basin. Without adequate flows for
14 downstream migration, the smolts will be subject to excess
15 predation and high water temperature, and will die. It is a
16 true waste of water to provide sufficient flows for upstream
17 migration of adults, sufficient spawning flows for adults,
18 sufficient incubation flows for the eggs in the gravel,
19 sufficient rearing flows for juveniles, and then not provide
20 sufficient downstream passage flows for smolts. Each spring,
21 if unregulated streamflows do not provide sufficient
22 streamflow for outmigration, SOAC must recommend to the Bureau
23 minimum, but sufficient, instream flows for smolt outmigration
24 so that the fish don't die."
25

See affidavit of C. Dell Simmons, October 3, 1994, p. 3-4.

20 III. CONCLUSION

21 ~~Certain~~ irrigation districts have asked this Court to clarify its
22 original holding in the November, 1990 Partial Summary ~~Judgment~~ and
23 enjoin the Yakima Field Office Manager from continuing the practice of
24 "flushing flows." In this Memorandum Opinion, the Court has once again
25 basically declined that request. If anything, the Court is reassured by

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1 the information produced in this dispute that the objectives and intent
2 of the Partial Summary Judgment are being achieved. The decision-making
3 process is inclusive; it is reactive to changing events, and it is based
4 on the scientific expertise of experienced officials far more qualified
5 in that area than this Court. The decisions appear to be based on the
6 best, if not unanimous, available science and it is absolutely clear
7 that this decision was reviewed several times to ensure that the goals
8 were accomplished with the absolute minimum amount of water.

9 The Court does request that SOAC and the Yakima Field Office
10 Manager continue to operate the river system cautiously and in good
11 faith, keeping the rights of all of the parties in mind. Additionally,
12 the Court asks that fish life be maintained with the absolute minimum
13 amount of water which is necessary for maintenance of fish life in the
14 Yakima River, regardless of the life stage of the fish.

15 Dated this 22nd day of December, 1994.

16
17 Walter A. Stauffacher
18 Judge Walter A. Stauffacher
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